IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 24, 2006 Session

STEPHEN KRUPP v. MAURA CUNNINGHAM-GROGAN

Appeal from the Circuit Court for Williamson County
No. 04146 Russ Heldman, Judge

No. M2005-01098-COA-R3-CV - Filed on August 29, 2006

This appeal involves the custody and visitation rights of the parents of a fifteen-year-old girl. The parents were already divorced by the time they moved to Tennessee. The mother was the primary residential parent, but the parties had informally agreed that the father would have more overnight visitation than was required by the Florida court's custody and visitation order. After the parents' relationship deteriorated in late 2003, the father filed a petition in the Circuit Court for Williamson County requesting that he be designated the child's primary residential parent. The mother responded by requesting that the father's visitation be reduced and that she be given sole decision-making authority over the child's religious upbringing and non-emergency healthcare. The trial court, sitting without a jury, dismissed the father's petition and granted the mother's counter-petition. The father appealed. We have concluded that the trial court properly found that there has been a material change in circumstance since the entry of the Florida custody order but that it is not in the child's best interests to modify the Florida court's custody and visitation arrangement other than to increase the father's summer visitation from three weeks to four and to vest final decision-making authority over the child's non-emergency healthcare and religious upbringing with the mother.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Donald Capparella, Nashville, Tennessee, for the appellant, Stephen Krupp.

Joanie L. Abernathy, Franklin, Tennessee, for the appellee, Maura Cunningham-Grogan.

OPINION

I.

Stephen Charles Krupp and Maura Katherine Cunningham-Grogan married in Florida in July 1989 following a whirlwind romance. Mr. Krupp was forty-three years old at the time and had recently retired from the shoe business. Ms. Cunningham-Grogan, a native of New York City, had been employed on Wall Street. Their only child, Kaitlin Elizabeth Krupp, was born in October 1990.

After the parties moved to Massachusetts in 1991, Ms. Cunningham-Grogan was employed by a mutual fund firm in Boston.

The parties divorced in Boston in 1993. The Massachusetts court decreed that the parties would share joint legal (i.e., decision-making) custody, awarded Ms. Cunningham-Grogan primary residential custody, and granted Mr. Krupp "liberal, unsupervised and reasonable" visitation of no less than one weekend per month and no more than two weekends per month. The decree also provided that the child would split her time equally between Mr. Krupp's and Ms. Cunningham-Grogan's homes during school vacations, including the summers.

Mr. Krupp moved to Florida following the divorce. In accordance with Mr. Krupp's expressed desire to maintain a relationship with his young daughter, Ms. Cunningham-Grogan and the child moved from Boston to another part of Florida shortly thereafter. In 1995, Mr. Krupp moved closer to Ms. Cunningham-Grogan's home to enable him to begin taking his daughter to temple.[1] Two years later, in 1997, a Florida court entered an order modifying the Massachusetts child custody arrangement to clarify the visitation schedule. The Florida modification order specified that Mr. Krupp would have visitation with the child every other weekend, overnight every Wednesday, and for three consecutive weeks during the summer.

Following a successful mediation in 2000, the parties agreed to alter the visitation schedule in the 1997 order to enable the child to visit Mr. Krupp overnight every Tuesday and Thursday rather than every Wednesday. Thus, for the next several years, the child spent 182 days each year at Mr. Krupp's home and 183 days each year at Ms. Cunningham-Grogan's home. For reasons that are unclear from the record on appeal, Mr. Krupp and Ms. Cunningham-Grogan chose not to ask the Florida court to approve this new visitation arrangement or to incorporate it into a legally enforceable custody order.

Ms. Cunningham-Grogan married Neil Grogan in 2001. In 2002, Ms. Cunningham-Grogan and her new husband moved to Brentwood, Tennessee, and Ms. Cunningham-Grogan began to work as a tax planner and financial advisor. The parties' daughter lived with Mr. Krupp in Florida for the final two months of the school year and then joined her mother and step-father in Brentwood. Shortly thereafter, Mr. Krupp moved from Florida to Brentwood after purchasing a house less than two miles from the Cunningham-Grogan residence.

Mr. Krupp and Ms. Cunningham-Grogan's post-divorce relationship has always been a difficult one, but it grew increasingly acrimonious following Ms. Cunningham-Grogan's remarriage and relocation to Tennessee. Both parties have made inappropriate, derogatory remarks to the child about the other parent that do not bear repeating here, and thus they share some degree of

[1] Mr. Krupp attended temple with his daughter for approximately three months. The parties agreed that they wanted the child to have a religious upbringing, but Mr. Krupp is an adherent of the Jewish faith, while Ms. Cunningham-Grogan is Roman Catholic. Ms. Cunningham-Grogan testified that she told Mr. Krupp, "I want her raised in one faith and I'll support you if it[']s Judaism." When Mr. Krupp ceased attending services with the child in 1995, he agreed to allow Ms. Cunningham-Grogan to raise the child in the Roman Catholic faith.

responsibility for the enmity that currently exists between them.[2] However, it is clear that the lion's share of the responsibility for the sharp deterioration in the parties' relationship following their relocation to Tennessee in 2002 rests with Mr. Krupp. Since that time, Mr. Krupp has consistently demonstrated an inability to conduct himself in a civil manner in dealings with Ms. Cunningham-Grogan.[3]

The tense relationship between Mr. Krupp and Ms. Cunningham-Grogan reached a boiling point in late 2003 when Mr. Krupp announced plans to purchase a house down the street from the Cunningham-Grogan residence. Ms. Cunningham-Grogan called Mr. Krupp and asked him to reconsider moving into a house where he would be within eyeshot and earshot of her home. Given their strained relationship and the fact that Mr. Krupp already lived less than two miles away, Ms. Cunningham-Grogan saw no point in the move other than to antagonize and harass her and her new husband. In response, Mr. Krupp stated simply, "I pretty much do what I want." Over the next few

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[2]The parties' insulting and disrespectful comments about one another call to mind the following exhortation from a Minnesota judge that Judge Don R. Ash repeats to the parents in every child custody case that comes before him:

> Your children have come into this world because of the two of you. Perhaps you two made lousy choices as to whom you decided to be the other parent. If so, that is your problem and your fault.
>
> No matter what you think of the other party – or what your family thinks of the other party – those children are one half of each of you. Remember that, because every time you tell your child what an idiot his father is, or what a fool his mother is, or how bad the absent parent is, or what terrible things that person has done, you are telling the child that half of him is bad.
>
> That is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to their emotions.
>
> . . . Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or they will suffer.

Don R. Ash, *Bridge over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. Mem. L. Rev. 769, 771-72 (1997).

[3]For instance, Mr. Krupp has written numerous hostile letters to Ms. Cunningham-Grogan over the years, many of which he made the parties' young daughter type up for him. At trial, Mr. Krupp claimed that he is now deeply ashamed of these venomous missives and of having used the parties' child as his scribe in writing them. Mr. Krupp admitted, however, that his sense of shame is of quite recent vintage and took some prodding to produce. In response to a question from his own attorney regarding how he felt about having made his daughter transcribe the hateful letters to Ms. Cunningham-Grogan, Mr. Krupp testified as follows:

> Well, I have to say one thing before I answer that. I say it took me a long time and [was] only with your help [i.e., the help of his trial counsel] that I realized how awful I was, how terrible it was that I put my daughter in the middle of that. I really never understood that. I never understood having her write a letter – that it was such a bad thing. It was one of the worst things – probably the worst thing I've ever done to her.

months, Mr. Krupp needled Ms. Cunningham-Grogan constantly with the details of each new development as he progressed closer and closer to moving onto her street.

When Mr. Krupp placed a down payment on the new house, Mr. Grogan went to Mr. Krupp's home to speak with him. The conversation did not go well. Mr. Grogan informed Mr. Krupp again that he and Ms. Cunningham-Grogan were quite disturbed by his plans to move down the street from them. According to Mr. Krupp, Mr. Grogan then threatened to "put [him] in the hospital" if he did not stop harassing Ms. Cunningham-Grogan and trying to interfere in their home life.[4]

That evening at the dinner table, Ms. Cunningham-Grogan broached the topic of Mr. Krupp's planned move with the parties' daughter, who was by then twelve years old. Ms. Cunningham-Grogan and her husband encouraged the child to tell them why Mr. Krupp wanted to move down the street from them, but the child said she did not know Mr. Krupp's reasons and thought it was a bad idea. At some point, the child began defending her father, and Ms. Cunningham-Grogan lost her temper. She yelled at the child, "Why is he doing this? Can't we have a life? He seems to be lobbing bombs into our family life[.] Why does he keep doing this?"

Upset by her mother's outburst, the child ran to her room, closed and locked the door, and called her father, crying. Unable to console his daughter, Mr. Krupp decided that the appropriate course of action was to call the police to Ms. Cunningham-Grogan's home. Once the police arrived, they spoke with Ms. Cunningham-Grogan, Mr. Grogan, and the child. The police did not arrest Ms. Cunningham-Grogan or her husband, and they did not remove the child from the home. The police eventually left the Cunningham-Grogan residence, and no charges were filed as a result of the incident.

Several months later, Mr. Krupp called the police to the Cunningham-Grogan residence again. The parties' daughter had been speaking disrespectfully to Mr. Grogan at the dinner table, culminating in the imperative statement, "Bite me." In response, Mr. Grogan told the child that her language was inappropriate and that he did not have to tolerate that kind of treatment. After Mr. Grogan left the dinner table, the child went to her room and called Mr. Krupp. When she came out of her room a few minutes later, she told Ms. Cunningham-Grogan that Mr. Krupp had again called the police. When Ms. Cunningham-Grogan asked why, the child said that she did not know and that she had asked Mr. Krupp not to call the police. Ms. Cunningham-Grogan thanked her daughter for letting her know and informed Mr. Grogan that Mr. Krupp had again summoned the police and that they would be arriving shortly.

As he had done before, Mr. Krupp drove to Ms. Cunningham-Grogan's house and waited in his car for the police to arrive. The parties' daughter joined him in the car. When Ms. Cunningham-Grogan came over to speak with Mr. Krupp, he put the car in the reverse and sped away up the street. Mr. Krupp did not, however, leave the area. Once the police arrived, they questioned Ms.

[4] Counsel for Ms. Cunningham-Grogan did not object to Mr. Krupp's testimony regarding Mr. Grogan's alleged hearsay statement, and Mr. Grogan did not testify at trial. However, there is no allegation in the record, much less any evidence, that Mr. Grogan struck Mr. Krupp or ever harmed or threatened to harm the child or Ms. Cunningham-Grogan on this or any other occasion.

Cunningham-Grogan, Mr. Grogan, and the child and decided not to make any arrests or remove the child from the home. The police denied Mr. Krupp's request to take the child home with him, noting that it was not one of his visitation days under the Florida court order. The police also used this occasion to inform Mr. Krupp that calling the police was not an appropriate response to arguments between Ms. Cunningham-Grogan and their daughter.[5] The following morning, Mr. Krupp, without Ms. Cunningham-Grogan's knowledge or permission, signed the child out of school shortly after Ms. Cunningham-Grogan dropped her off.

After the second incident, Mr. Krupp cancelled his plans to move into the house down the street. Nevertheless, the parties' relationship remained contentious, with the disputes ranging from the proper religious upbringing for the child to the child's healthcare to her future education. The parties' escalating quarrels took their toll on the child's health, both mentally and physically. The child suffered from low self-esteem and showed signs of becoming somewhat socially withdrawn. The child's relationship with her mother became strained in spite of the fact that they had always had a good relationship in the past.

On March 3, 2004, after domesticating the 1993 Massachusetts decree and the 1997 Florida order, Mr. Krupp filed a petition in the Williamson County Circuit Court to modify the existing child custody arrangement. He claimed that there had been a material change in circumstance since the entry of the 1997 Florida order in that: (1) the child was then thirteen years old and thus old enough to have her preference taken into account; (2) Ms. Cunningham-Grogan belittles and berates the child, thereby injuring her self-esteem and preventing a close mother-child relationship; (3) Mr. Krupp is the child's primary care-giver and provides for all of the child's medical care; and (4) the parties have relocated to Tennessee.[6] He also requested the court to designate him as the child's primary residential parent and to grant Ms. Cunningham-Grogan visitation every other weekend, one night during the week, and three weeks during the child's summer vacations.

Ms. Cunningham-Grogan denied Mr. Krupp's assertion that there had been a material change of circumstance since the entry of the Florida court order and that it was in the child's best interests for him to be made the primary residential parent. However, after an unsuccessful attempt at mediation, Ms. Cunningham-Grogan filed an amended answer and counter-petition conceding that there had been a material change of circumstance but denying the specific facts alleged in Mr. Krupp's complaint with the exception of his claim that the parties both now live in Tennessee.

Ms. Cunningham-Grogan charged that it was not in their daughter's best interests to continue spending roughly half her time with Mr. Krupp because Mr. Krupp had become increasingly

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[5] Mr. Krupp appears to have a penchant for calling the police to resolve non-violent disputes with his ex-wife. When the parties were still living in Florida, Mr. Krupp instructed the directors of a summer camp the child was attending to call the police if Ms. Cunningham-Grogan showed up at the camp on a day not specified in the Florida court's order as a day that the child was supposed to be with her. As Ms. Cunningham-Grogan put it, "It seems like his [i.e. Mr. Krupp's] only remedy to a disagreement with me is to call the authorities."

[6] Mr. Krupp also sought modification of the child support order. The trial court entered an agreed order on December 1, 2004 resolving the financial disputes between the parties, and the issue of child support is not presently before this court.

controlling over every aspect of the child's life and because he was attempting to alienate the child from her. She recounted the two incidents in which Mr. Krupp had called the police to her residence and alleged that Mr. Krupp had become so angry, hostile, isolated, and out of touch with society that the child was becoming or had already become his only link to the outside world. Ms. Cunningham-Grogan attributed her daughter's recent physical and emotional problems to Mr. Krupp's emotional state and controlling and antisocial behavior and asserted that it was not in the child's best interests to spend more than every other weekend with Mr. Krupp.

Accordingly, Ms. Cunningham-Grogan requested that the trial court modify the 1997 Florida order to allow Mr. Krupp visitation every other weekend with no overnight visits during the week. In addition, in light of their recent disputes over the child's religious upbringing, education, and non-emergency healthcare, Ms. Cunningham-Grogan requested that she be given the final say over decisions in these areas. Finally, Ms. Cunningham-Grogan asked that the court enjoin Mr. Krupp from visiting her home except to pick up or drop off the child for scheduled visits, from exiting his car on those occasions, and from removing the child from school without her consent.

Two weeks later, on October 26, 2004, Mr. Krupp filed an amended petition for modification. As in his original petition, Mr. Krupp asked the court to make him the primary residential parent. However, in a departure from his original petition, Mr. Krupp requested that Ms. Cunningham-Grogan be granted visitation every other weekend only rather than every other weekend plus one overnight visit during the week. In addition, Mr. Krupp requested that he be made the final decision-maker for issues relating to the child's religious upbringing.

The trial court conducted a final hearing on the modification petition and counter-petition on March 8, 2005. Both parties testified, as did the child outside the presence of either parent.[7] At the conclusion of the hearing, the court stated that it was clear from the evidence presented that both parties care deeply about the welfare of the child. However, the court specifically found that Ms. Cunningham-Grogan was a "very good witness" and that her testimony was "highly credible." The trial court also announced its conclusion that there had been a substantial and material change of circumstance since the entry of the Florida order in 1997, that the current custody and visitation arrangement was no longer working, and that Ms. Cunningham-Grogan was the comparatively more fit parent.

On April 13, 2005, the trial court entered a written order dismissing Mr. Krupp's modification petition and granting Ms. Cunningham-Grogan's counter-petition. The court ordered that Ms. Cunningham-Grogan would remain the primary residential parent and that the visitation schedule would largely revert to that contemplated by the 1997 Florida order, i.e., Mr. Krupp would exercise visitation with the child every other weekend and overnight on Wednesdays. However, the court modified the 1997 order to increase Mr. Krupp's summer visitation from three weeks to four.

The trial court granted Ms. Cunningham-Grogan's request to modify the Florida order to give her the final say over issues relating to the child's non-emergency healthcare and religious liberty;

[7] The parties' attorneys were allowed to question the child, and the child's testimony is contained in the record on appeal.

however, the court determined that the parties should continue to make educational decisions jointly. As requested by Ms. Cunningham-Grogan, the court enjoined Mr. Krupp from going to Ms. Cunningham-Grogan's home except to pick up or drop off the child for scheduled visitation, from leaving his car on those occasions, and from removing the child from school without Ms. Cunningham-Grogan's knowledge and consent apart from his designated visitation times. In addition, the court enjoined both parties from speaking in a negative manner about the other parent in the child's presence. Finally, the court awarded Ms. Cunningham-Grogan $6,825 in attorney's fees and costs. Mr. Krupp appealed.

II.
THE STANDARD OF REVIEW FOR CUSTODY DECISIONS

Custody and visitation decisions are among the most important decisions that courts make. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Their chief purpose is to promote the child's welfare by creating an environment that promotes a nurturing relationship with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Each parent has his or her own strengths and weaknesses, *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996), and it would be unrealistic to measure parents against a standard of perfection, *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000); *Bush v. Bush*, 684 S.W.2d 89, 93 (Tenn. Ct. App. 1984). Thus, custody and visitation decisions are not intended to reward parents for prior virtuous conduct or to punish them for their human frailties or past missteps. *Earls v. Earls*, 42 S.W.3d at 885; *Gaskill v. Gaskill*, 936 S.W.2d at 630. Rather, taking the parents as they presently are, the courts must pragmatically decide whether the parents will be able to share the responsibilities for raising their child jointly and, if not, which parent is comparatively more fit to take on the primary parenting role. *Oliver v. Oliver*, No. M2002-02880-COA-R3-CV, 2004 WL 892536, at *2 (Tenn. Ct. App. Apr. 26, 2004) (No Tenn. R. App. P. 11 application filed); *McEvoy v. Brewer*, No. M2001-02054-COA-R3-CV, 2003 WL 22794521, at *2 (Tenn. Ct. App. Nov. 25, 2003) (No Tenn. R. App. P. 11 application filed).

Tennessee courts are statutorily authorized to alter custody arrangements as required by intervening circumstances. Tenn. Code Ann. § 36-6-101(a)(1) (2005). However, given the importance of stability in a child's life, a court should not alter an existing custody arrangement until: (1) it is satisfied either that the child's circumstances have changed in a material way since the entry of the presently operative custody decree or that a parent's circumstances have changed in a way that affects the child's well-being; (2) it has carefully compared the current fitness of the parents to be the child's custodian; and (3) it has concluded that changing the existing custody arrangement is in the child's best interests. Tenn. Code Ann. § 36-6-101(a)(2)(B), (C); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002).

III.
THE EXISTENCE OF A MATERIAL CHANGE IN CIRCUMSTANCE

Mr. Krupp argues elliptically that the trial court both erred and did not err in concluding that the evidence in the record establishes that there has been a material change in circumstance warranting reevaluation of the 1997 Florida custody and visitation order. First, he insists that the evidence preponderates *against* the trial court's finding of a material change in circumstance that would justify reducing his current visitation with the child. Then, he asserts that the evidence preponderates *in favor of* a finding that there was a material change in circumstance "pointing to more time" with him. Mr. Krupp's inherently contradictory positions on whether there has or has not been a material change in circumstance since the entry of the 1997 Florida order rests on an incorrect formulation of the governing legal analysis.

A.

The first question a court must decide in evaluating a complaint or petition for modification of a pre-existing child custody or visitation order is whether there has been a "material change in circumstance" since the entry of the prior order. Tenn. Code Ann. § 36-6-101(a)(1)(B), (C). Only if the court answers this "threshold" question in the affirmative does it proceed to perform a new comparative fitness analysis and then determine whether a new custody and visitation arrangement is in the child's best interests. *Kendrick v. Shoemake*, 90 S.W.3d at 575; *McEvoy v. Brewer*, 2003 WL 22794521, at *4. The inquiry into whether there has been a material change in circumstance is thus not directly tied to the substantive question regarding the best custody and visitation arrangement under the present circumstances.

In making a fresh determination regarding best interests, the court is not, of course, writing on a clean slate. In a modification proceeding, there is, by definition, a pre-existing court order in place, as well as an existing status quo. Where, as here, the existing status quo deviates from that envisioned by the prior court order, the General Assembly has determined that it is the terms of the prior order, and not the existing status quo, that constitutes the default position in the modification proceeding. Tenn. Code Ann. § 36-6-101(a)(1)(B), (C).[8] Nevertheless, in making the best interests

[8] As a result, parents and guardians remain free to agree to deviations from the existing custody or visitation order on a provisional or even long-term basis without having to fear that their flexibility will create a new, legally enforceable schedule that they cannot revoke without returning to court. There are numerous reasons a parent or guardian might decide to allow another parent or guardian to spend more time with a child without wanting the new schedule incorporated into an enforceable court order, e.g., a lack of funds to hire an attorney and return to court, a desire to avoid litigation with its attendant stresses on the parties and the child, implementation of a new schedule on a provisional basis to see if it will work before committing to a permanent change, or a concern that the other parent or guardian, while currently stable, may later revert to old ways, succumb to erstwhile vices, or experience a recurrence of a chronic illness that has materially compromised his or her ability to care for the child in the past.

determination, the court cannot simply ignore the existing custody and visitation arrangement and whether and how well it appears to be working.[9]

Mr. Krupp's primary arguments on appeal conflate the threshold inquiry into whether there has been a material change in circumstance with the substantive inquiry regarding the custody and visitation arrangement that will best serve the child's interests under the present circumstances. A finding of a material change in circumstance since the entry of the prior custody or visitation order no more predetermines the outcome of the best interests analysis in a modification case than does a finding of statutory grounds for termination in a termination of parental rights case. *See, e.g.*, *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187, 193 (Tenn. Ct. App. 2004). Thus, a finding of a material change in circumstance warranting a reevaluation of the child custody determination does not necessarily require that any change in custody or visitation be made.

B.

Parties cannot make arguments on appeal that are inconsistent with the arguments they made in the trial court. Thus, having contended in the trial court that there has been a material change in circumstance sufficient to trigger a judicial reevaluation of the 1997 child custody and visitation order, Mr. Krupp is judicially estopped from denying the existence of a material change in circumstance on appeal. *In re Austin S.*, No. M2005-01839-COA-R3-JV, 2006 WL 770455, at *2 (Tenn. Ct. App. Mar. 24, 2006) (No Tenn. R. App. P. 11 application filed); *see also Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999); *Webber v. Webber*, 109 S.W.3d 357, 359 (Tenn. Ct. App. 2003). However, even if Mr. Krupp were not judicially estopped, the evidence in the record overwhelmingly rebuts any claim that the child's and the parties' circumstances have not changed materially since 1997.

Since the entry of the operative custody order in 1997, the parties and the child have all moved from Florida to Tennessee, the child is almost ten years older, Mr. Krupp has become increasingly isolated and confrontational in his dealings with Ms. Cunningham-Grogan, and Mr. Krupp has twice called the police to Ms. Cunningham-Grogan's residence without good cause. Moreover, the child's stress level is so high that it has had pronounced physical and emotional effects on her. She is currently suffering from low self-esteem, she is becoming isolated, and her relationship with her mother has become significantly more difficult. These facts, all of which arose after the entry of the Florida court order in 1997, are more than sufficient to establish the requisite material change in circumstance warranting reexamination of the 1997 custody and visitation order.

[9] It should be noted that this factor cuts both ways. If the new status quo is better than the situation that existed before the deviation from the prior order – i.e., if the child is now thriving, her or his relationship with both parents is stronger than it was before, the new schedule works better, and the parents are getting along better than before – this factor will weigh heavily in favor of a finding that modification of the prior order to conform to the current status quo is in the child's best interests. However, where the child's and the parents' situation has not changed since the deviation or where, as here, the situation has actually deteriorated, this factor will militate strongly against a finding that transforming the parties' informal agreement into a legally enforceable custody order is in the child's best interests.

IV.
THE BEST INTERESTS OF THE CHILD

Mr. Krupp also insists that the trial court erred by determining that it is in the child's best interests to allow Ms. Cunningham-Grogan to remain the primary residential parent and by reducing his current visitation largely to that envisioned by the 1997 order. We disagree. Based on our review of the record, we conclude that the facts, as found by the trial court, support the trial court's decision.

Ms. Cunningham-Grogan and her new husband have provided a stable home for the child, and the child has, overall, a good relationship with her mother and step-father. Ms. Cunningham-Grogan has consistently met the child's needs and has been actively involved in her care and schooling. Although she has made insulting remarks regarding Mr. Krupp to the child on far too many occasions in the past, her actions reveal a firm commitment on her part to fostering a healthy parent-child relationship between Mr. Krupp and the child, e.g., by relocating from Boston to Florida to enable Mr. Krupp to be actively involved in rearing the child and voluntarily agreeing in 2000 to let Mr. Krupp have an additional overnight visit with the child every week.

Mr. Krupp has also shown himself to be a good, if not perfect, parent. Like Ms. Cunningham-Grogan, Mr. Krupp has participated actively in the child's schooling, has historically been more active than Ms. Cunningham-Grogan in taking the child to doctor's appointments and the like, and has assisted in paying for the child's education. Mr. Krupp has structured his life to allow him to spend a great deal of time with the child and has moved twice, once in-state and once out-of-state, to be closer to her. Thus, it is clear from the record that Mr. Krupp loves his daughter deeply and enjoys an especially close relationship with her.

However, unlike Ms. Cunningham-Grogan, Mr. Krupp appears bent on antagonizing his former spouse and in alienating the child from her. Both before and after he filed his 2004 modification petition, Mr. Krupp engaged in a pattern of conduct that seems calculated primarily, if not solely, to harass Ms. Cunningham-Grogan and to disrupt the parent-child relationship between Ms. Cunningham-Grogan and the child. Through his actions, which have ranged from threatening to move into a house a few doors down to sending numerous vituperative letters to Ms. Cunningham-Grogan to having the child write out many of these letters to calling the police to the Cunningham-Grogan residence unnecessarily on two separate occasions, Mr. Krupp has shown clearly that he is either unwilling or unable to conduct himself in a manner conducive to the creation and maintenance of a harmonious relationship between himself and Ms. Cunningham-Grogan and between Ms. Cunningham-Grogan and the child. To put it mildly, Mr. Krupp's past conduct has tended to inflame rather than calm the situation, thereby placing considerable stress on both parties and the child. Moreover, Mr. Krupp has set a very poor example for the child in terms of how adults are expected to resolve their disagreements in our society.

Mr. Krupp stresses that the child, who was fourteen years old at the time of the final hearing, expressed a preference for spending more time, not less, with him. The reasonable preference of a child twelve years or older is certainly a significant factor in deciding what custody and visitation arrangement is in the best interests of the child. Tenn. Code Ann. § 36-6-106(a)(7)(A). However, it is not dispositive. And for good reason. A child's expressed preference to spend more time with

a parent may well reflect perfectly legitimate and even wise reasons, e.g., the child feels more comfortable around one parent or the other, one parent's home environment is more conducive to studying or other important activities, or the child is experiencing conflict with a parent's new spouse or significant other. However, a child's preference may also reflect a child's misguided attempt to keep one parent from continuing to harass the other, manipulation by a parent, or a successful campaign on the part of one parent to alienate the child from the other parent. The record on appeal amply supports the trial court's implicit conclusion that the child's expression of her preference in this case belongs in the latter category.

In short, Mr. Krupp has failed to meet his burden of showing that it is in the child's best interests to modify the 1997 custody order to make him the primary residential parent or to increase his legally enforceable visitation with the child beyond every other weekend and one night during the week.[10] The resulting increase in the amount of time the child actually spends at Ms. Cunningham-Grogan's home will afford Ms. Cunningham-Grogan a greater opportunity to counteract Mr. Krupp's attempt to alienate her from the child. Moreover, while Ms. Cunningham-Grogan has not been a perfect parent, she has thus far provided a far better role model for the child regarding how adults and former spouses should resolve their disputes, and the child may well benefit from spending more time with Ms. Cunningham-Grogan for this reason. The record also supports the trial court's finding that it is in the best interests of the child to modify the prior custody order to make Ms. Cunningham-Grogan the final decision-maker for issues relating to non-emergency healthcare and the child's religious upbringing given the parties' recent disputes over these issues and Mr. Krupp's approach to conflict resolution in dealings with his ex-wife.

V.
THE INJUNCTIVE RELIEF

Mr. Krupp also takes issue with the trial court's award of injunctive relief as requested by Ms. Cunningham-Grogan. He contends that the evidence does not support the injunction prohibiting him from going to the Cunningham-Grogan residence except to pick up or drop off his daughter for scheduled visits, from leaving his car on those occasions, and from removing the child from school without Ms. Cunningham-Grogan's consent apart from his scheduled visitation times.

This argument is meritless. It is undisputed that Mr. Krupp has removed the child from school without Ms. Cunningham-Grogan's consent outside his scheduled visitation time, and Mr. Krupp's well-documented incivility to Ms. Cunningham-Grogan supports the other two restrictions. Accordingly, the trial court did not err in granting the injunctive relief requested by Ms. Cunningham-Grogan.[11]

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[10] Ms. Cunningham-Grogan does not challenge the trial court's decision to modify the Florida order to increase Mr. Krupp's summer visitation with the child from three weeks to four.

[11] Mr. Krupp also asks us to reverse the trial court's award of attorney's fees and costs to Ms. Cunningham-Grogan if we find in his favor on any of his claims on appeal. In light of our rejection of Mr. Krupp's other claims, this request is now moot.

VI.

We affirm the trial court's April 13, 2005 order dismissing Mr. Krupp's petition for modification and granting Ms. Cunningham-Grogan's counter-petition and remand the case to the trial court for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal to Stephen Charles Krupp and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.